

had been employed as an apprentice fitter by the Contractor about two weeks prior to the accident at a daily wage of \$7 which for a 25-day month would be \$175. He had more than a basic education and would no doubt have advanced into a fully-pledged skilled workman if not for the loss of his leg. He was unemployed for about 2 years after the accident and thereafter earned a living as an unqualified teacher. At the date of trial he earned \$170 a month in a temporary job as a kindergarten teacher.

For loss of earnings I would award the plaintiff \$4,200 for the first two years after the accident on the basis of \$175 per month, \$6,600 for the next 5 years at \$110 per month, \$7,200 for the next 3 years at \$200 per month that would more or less bring up to the date of judgment. The future loss of earnings should also be calculated on the basis of a loss of \$200 per month for 14 years which using the annuity tables gives the rounded off amount of \$24,000.

As compensation for pain and suffering and loss of the usual amenities I agree with all three counsel that \$38,000 would be fair.

Accordingly there will be judgment against 1st named defendant in the sum of \$80,000 together with interest on the actual loss of earnings calculated at 6% per annum from the dates they were deemed to have been accrued (taking it on a yearly basis) until judgment and thereafter and until realisation at 8% per annum, on the future loss of earnings at 8% per annum from date of judgment until realisation and on the \$38,000 for pain and suffering at 4% per annum from the date of service of the writ on the 1st defendant until judgment and thereafter at 8% until realisation.

The 1st defendant will also pay the costs taxed by the proper officer of the court of each the plaintiff and the 3rd defendant.

Order accordingly.

Solicitors: Khoo & Sidhu; Chooi & Co.; Morris Edgar & Clough Thuraisingham.

MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD. v. MALAYSIAN AIRLINES SYSTEM BHD.

[O.C.J. (Mohamed Azmi J.) December 23, 1981]
[Kuala Lumpur — Civil Suit No. 1205 of 1978]

Equity — Assignment — Equitable assignment — Civil Law Act, 1956, s. 4(3).

In this case the plaintiff sued the defendant as assignee of a debt due from the defendant to Bahagia Trading Sdn. Bhd. in respect of certain contracts made between Bahagia and the defendant. Bahagia had agreed to assign and transfer absolutely to the plaintiff the whole of the moneys due and payable to it from the defendant under the said contracts as a consideration of and a further collateral security for a loan of \$400,000 granted to it by the plaintiff. An assignment deed was executed by the plaintiff and forwarded to the defendant who signed it. The deed had not then been signed by Bahagia but was signed later. The issue in this case was whether there was an equitable assignment and if so whether it was effective before the defendant made the payments to Bahagia.

A **Held:** (1) the plaintiff could not have succeeded if it were to prove its claim under legal assignment as no statutory notice was given to the defendant as stake-holder as required by section 4(3) of the Civil Law Act, 1956;

(2) once there was a clear intention on the part of Bahagia, the assignor, that the defendant should get the benefits of the MAS contract by conveying such intention to the plaintiff, an equitable assignment was created and when the defendant became aware of it, it became a trustee for the plaintiff in respect of the moneys due under the contract to Bahagia and the defendant as a debtor or stake-holder is liable to pay the sums due to the plaintiff, although it had paid the sums to Bahagia, albeit in breach of trust;

B (3) the mere fact that there is still something to be done between the assignor and the assignee regarding the assignment such as to formalise the assignment in a deed or the fact that goods under the MAS contract had not been fully supplied, did not bar the creation of an equitable assignment, once the debtor or stakeholder came to know or had acknowledged it;

(4) the failure to join the assignor as a party was, in the circumstances of the case, not fatal to the plaintiff's claim.

Cases referred to:-

- (1) *William Brandt's Sons & Co. v. Dunlop Rubber Company* [1905] A.C. 454.
- D** (2) *James Talcott Ltd. v. John Lewis & Co. Ltd.* [1940] 3 All E.R. 592.
- (3) *Rossiter v. Miller* [1878] 3 A.C. 1124, 1151.
- (4) *Palmer v. Culverwell Brooks & Co.* (1902) 85 L.T. 758 & 759.
- (5) *In re Patrick* [1891] 1 Ch. 82.
- E** (6) *Malayawata Steel Bhd. v. Government of Malaysia* [1980] 2 M.L.J. 103.
- (7) *Sanders & Co. v. Peek* (1884) 50 L.T. 630.

[The following cases were also cited in argument:—*Durham Brothers v. Robertson* [1898] 1 Q.B. 765; *Williams v. Atlantic Assurance Co. Ltd.* [1933] 1 K.B. 81 C.A.; *In re Steel Wing Co. Ltd.* [1921] 1 Ch. 349; *Walter & Sullivan Ltd. v. J. Murphy & Sons Ltd.* [1955] 2 W.L.R. 919; *Johnstone v. Cox* (1881) 19 Ch. 17; *Brice v. Bannister* (1878) 3 Q.B.D. 569; *Johara Bi binte Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor.* [1981] 1 M.L.J. 139; *United Overseas Bank Ltd. v. Singapore Engineers Ltd.* [1966] 2 M.L.J. 267; *Bateman & Anor. v. Hunt & Ors.* [1904] 2 K.B. 530; *Bickerton v. Walker* (1885) 31 Ch. 151.]

CIVIL SUIT.

C. V. Das for the plaintiff.

G Chin Yew Meng for the respondent.

Mohamed Azmi J.: This is a claim by Malaysian International Merchant Bankers Berhad (MIMB) as assignee of a debt due from Malaysian Airlines System Berhad (MAS) to Bahagia Trading Sdn. Bhd., in respect of certain contracts, the particulars of which are contained in Exhibits AB8 to AB11, and summarised in paragraph 3 of MAS' Statement of Defence. Although the claim is for the sum of \$64,542, it is now conceded by the plaintiff that from the particulars of payments made by MAS to Bahagia/Assignor, only the sum of \$62,358 can be due and payable to MIMB under the deed of assignment dated March 18, 1976. (See Exhibits AB1 to AB12). In the circumstances, if MAS were liable under legal or equitable assignment as a debtor or stake-holder, the plaintiff could only obtain judgment in the sum of \$62,358 and not \$64,542.

I At the commencement of these proceedings, certain agreed issues of facts and law are recorded for the determination of the court. On facts, the only issue for determination is whether, when the 1976

deed of assignment was sent to MAS vide letter dated June 26, 1975 (AB13), the document was already executed by MIMB — the plaintiff/assignee. On law, two issues have been agreed. Firstly, whether on the evidence, there is an assignment in law or equity; and, secondly, if there is an enforceable assignment in law or equity, when was the effective date of the assignment? From the final submission of counsel for MIMB, it is conceded that plaintiff's claim would stand or fall on the principle of equitable assignment. In my view, it is obvious that the plaintiff cannot succeed if it were to prove its claim under legal assignment as no statutory notice was given to MAS as stake-holder as required by section 4(3) Civil Law Act 1956. Proper notice was only given vide letter dated April 22, 1976 (AB15) when assignee's copy of the deed of assignment was forwarded to MAS, but by that date, the fifth and final payment had already been made by MAS to Bahagia, leaving practically nothing to be assigned. That being the case, the only issue of law is whether there was an equitable assignment, and, if so, whether it was already effective before MAS made the first payment to Bahagia/Assignor on September 12, 1975 and the other four subsequent payments as particularised in paragraph 7 of Statement of Agreed Facts. On the principle of equitable assignment, the dispute in the present case can be narrowed down to whether an equitable assignment had come into force by July 2, 1975 as pleaded in paragraph 3 of plaintiff's reply.

From the Statement of Agreed Facts and Agreed Bundle of Documents, it is common ground that at the material time there was a contract between MAS and Bahagia for the supply to MAS of punch cards, computer cards and forms, for a total sum of \$64,542. Bahagia had agreed to assign and transfer absolutely to MIMB the whole of moneys due and payable to it from MAS under the said contract as a consideration of and a further collateral security for a loan of \$400,000 granted to it by MIMB. By Exhibit AB13, the letter dated June 26, 1975, five copies of the Assignment Deed were forwarded by MIMB's solicitors to MAS for execution, although at that time the documents were not yet executed by Bahagia/Assignor. Exhibit AB13, which was copied to Bahagia, is reproduced in full below:—

"June 26, 1975.

Dear Sirs,

Per: Bahagia Trading Sdn. Bhd.

Tender for supply of punch cards, preprinted order computer cards and continuous purchase order computer forms

We act for Malaysian International Merchant Bankers Berhad of 5th Floor, Bangunan Yee Seng, Jalan Raja Chulan, Kuala Lumpur who has agreed to grant a loan to the above-named company.

2. As security for the loan the said company has agreed to assign all the moneys due and payable to them by you under the provisions of the abovementioned tender contract. In this connection we enclose herewith five (5) copies of the Assignment for your execution at page 6 thereof and return please for our further attention.

3. We shall forward you a copy of the said Assignment after it has been duly stamped.

*Yours faithfully,
Sd.*

A Malaysian Airline System Berhad,
5th Floor, Wisma Pahlawan,
Jalan Sulaiman/Jalan Kampung Attap,
Kuala Lumpur.

c.c. (i) MIMB.

(ii) Bahagia Trading Sdn. Bhd.,
Kuala Lumpur.

B Vide letter dated July 2, 1975 (Exhibit AB14), MAS returned the five documents duly executed to MIMB's solicitors in the following terms:—

"2nd July 1975

M/S Shook Lin & Bok,
Advocates & Solicitors,
Bangunan Lee Wah Bank,
Medan Pasar,
Kuala Lumpur.

C

Dear Sirs,

BAHAGIA TRADING SDN. BHD.

**TENDER FOR SUPPLY OF PUNCH CARDS,
PREPRINTED ORDER COMPUTER CARDS
AND CONTINUOUS PURCHASE ORDER
COMPUTER FORMS**

D

With reference to your letter TKH/9463-84/MIMB/BTSB dated 26th June 1975, I return herewith, please, all the five copies of the Assignment in respect of the above duly executed by us.

Kindly forward to us a duly stamped copy of the said Assignment.

*Yours faithfully,
for MALAYSIAN AIRLINE SYSTEM BERHAD,
Sd.
KHALID MOHAMAD
Legal Affairs Officer"*

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Although the Assignment Deed was executed by MAS on July 2, 1975 by which it acknowledged the assignment (see Exhibit AB7), the deed of assignment was not executed by Bahagia/Assignor till March 18, 1976, i.e. about 8½ months after acknowledgment by MAS — the stake-holder. In fact, the Assignment Deed itself is dated March 18, 1976. On the facts, I accept the unchallenged evidence of Mr. Chan Gak Keong (PW1) that in June 1975 he was MIMB Secretary and that he signed the five copies of deed of assignment on June 25, 1975. As such, it is my finding that when MAS executed the documents on July 2, 1975 in acknowledgment of the assignment, they were already executed by MIMB as Assignee, though Bahagia/Assignor had not signed them.

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On agreed issues of law, in equitable assignment, no particular form of words is required. The only thing that is necessary is to make the meaning plain. The words must clearly show *an intention that the assignee (in this case MIMB) is to have the benefit of the chose in action*. The assignment may be addressed *either to the debtor (in this case MAS) or to the Assignee*. (See *Halsbury's Laws of England*, 4th Edition, Volume 6, para 30). In short, there must be a clear intention on the part of Bahagia/Assignor that MIMB is to have the moneys due from MAS, under the contract between Bahagia and MAS. Bahagia must address the assignment either to MAS or MIMB. As between the assignor and the assignee, an equitable assignment, whether voluntarily or for value, is absolute and complete without notice having been given to the debtor or fundholder. (See para. 41 of *Halsbury*). But, a debtor or fundholder

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who has received notice of an equitable assignment must withhold all further payments to the assignor unless made with the consent of the assignee, for if he pays to the assignor without such consent, he will have to pay over again to the assignee. After notice, the debtor or fundholder becomes trustee for the assignee. (See para 70 *Halsbury*). Thus, in *William Brandt's Sons & Co. v. Dunlop Rubber Company*,⁽¹⁾ merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase money and requested the purchasers to sign an undertaking to remit the purchase money to the bank. Reversing the decision of the Court of Appeal [1904] 1 K.B. 387 and restoring the decision of Walton J., it was held by the House of Lords that there was evidence of equitable assignment of the debt to the bank with notice to the purchasers and that the bank could recover the debt from the purchasers. In this case, in determining whether there is clear intention on the part of Bahagia that MIMB should have the moneys due to it under its contract with MAS, I take into consideration Exhibits P1, P2 and P3. To my mind, these correspondence show, as between Bahagia and MIMB, a clear intention on the part of Bahagia that in consideration of the loan of \$400,000, it would assign to MIMB, *inter alia*, MAS contract to the value of \$64,542. The Heads of Terms (Exhibit P2) laid out the terms and conditions of the loan as offered in Exhibit P1. The terms and conditions were accepted by Bahagia at page 3 of Exhibit P2, and the five copies of MAS' assignment were sent by Mr. Chan Gak Keong (PW1) with other assignments to MIMB's solicitors on June 25, 1975 vide Exhibit P3 for their attention. In this connection, I accept the evidence of Mr. Chan that the person who signed the acceptance by Bahagia is one Ibrahim bin Medan. Mr. Chan identified the signature of acceptance as that of Ibrahim, the managing director of Bahagia. I also note that the signature is the same as the one found in the Deed of Assignment at Exhibit AB6 as signatory of Bahagia, the Assignor. As between the Bahagia/Assignor and MIMB/Assignee, I am of the view that the equitable assignment was complete and became absolute when the acceptance of the terms and conditions as set out in the Heads of Terms was executed by Bahagia by June 25, 1975. Then notice of the equitable assignment was made to MAS on July 2, 1975 when it acknowledged the assignment in Exhibit AB7 in the following terms:—

"We, MALAYSIAN AIRLINE SYSTEM BERHAD a company incorporated in Malaysia and having a place of business at 5th Floor, Wisma Pahlawan, Jalan Sulaiman/Jalan Kampung Attap, Kuala Lumpur, DO HEREBY ACKNOWLEDGE that on this 2nd day of July 1975 the foregoing Assignment was intimated to us by the delivery of a true copy thereof and the same has been duly noted in our records.

SIGNED by
for and on behalf of
MALAYSIAN AIRLINE SYSTEM BERHAD
in the presence of:-
Sd.

Legal Officer
MALAYSIAN AIRLINE SYSTEM BERHAD
Sd.

Corporate Affairs Officer
MALAYSIAN AIRLINE SYSTEM BERHAD"

In my view, the effect of this acknowledgment is that as from July 2, 1975, MAS as stakeholder became a trustee for MIMB in respect of moneys due under MAS contract with Bahagia, and MAS is liable for any payments made to anybody else other than MIMB, unless made with consent of MIMB. In equitable assignment, it is immaterial that Bahagia/Assignor did not sign the deed of assignment till March 18, 1976. On the facts of the present case, I find an enforceable equitable assignment was already created by June 25, 1975, as between Bahagia and MIMB, irrespective of whether they had signed the deed of assignment. In my view, in the circumstances of this case, the signature by Bahagia is a mere formality and the deed is only relevant in that, firstly, it confirms the intention of Bahagia to give the benefit of MAS contract to MIMB, when it accepted MIMB loan offer in June 1975, and, secondly, it proves conclusively that MAS became aware of the assignment by July 2, 1975. From its letter to MIMB's solicitors dated July 2, 1975 (Exhibit AB14), I am satisfied that MAS acknowledged the assignment without any condition. The acknowledgment of the assignment in AB7 must be accepted on its face value in the absence of any explanation by Khalid bin Mohamad, the Legal Officer of MAS, who signed the document. By AB7, MAS does not only acknowledge the assignment of MAS contract with Bahagia to MIMB, but it also confirms that the assignment "has been duly noted" in its records. Unlike the case of *James Talcott, Ltd. v. John Lewis & Co. Ltd.*,⁽²⁾ notice of the assignment to MAS as a debtor or stakeholder is not ambiguous. AB7 was signed by a legal officer. Further, the mere fact that there is still something to be done between Assignor and Assignee regarding the assignment, such as to formalize the assignment in a deed or goods under the MAS contract have not been fully supplied, does not bar the creation of an equitable assignment, once the debtor or stakeholder came to know or had acknowledged it. (See *Rossiter v. Miller*,⁽³⁾ *Palmer v. Culverwell, Brooks & Co.*,⁽⁴⁾ *In re Patrick*,⁽⁵⁾ and *Malayawata Steel Bhd. v. Government of Malaysia*,⁽⁶⁾ and *Halsbury* Volume 6, 4th Edition, para 32). In such a case, the assignment will become enforceable when money becomes due and payable by the debtor or stakeholder. Further, Mr. Chan Gak Keong's evidence that the entire loan of \$400,000 had been disbursed by MIMB to Bahagia/Assignor by July 22, 1975 has not been challenged. On this point, I accept Mr. Chan's evidence that MIMB would not have given the loan, if Bahagia had refused to assign the MAS contract. Further, both AB13 and AB15 were copied to Bahagia, and there is no evidence that it has denied or objected to the assignment. By its silence, Bahagia has consented to and confirmed the existence of the assignment by June 25, 1975, i.e. before the first payment was made by MAS to Bahagia. Mr. Chin Yew Meng, counsel for MAS, argues that when Exhibit AB15 is read together with Exhibit AB13, there was no properly constituted contract but only an agree-

ment between MIMB and Bahagia to assign. To my mind, the distinction between contract and agreement is not relevant for the purpose of determining the existence of an equitable assignment in this case. Once there is a clear intention on the part of Bahagia that MIMB should get the benefits of the MAS contract by conveying such intention to MIMB, an equitable assignment is created, and when the stake-holder/MAS became aware of it on July 2, 1975, it became a trustee for MIMB in respect of the moneys due under the MAS contract with Bahagia, and MAS as a debtor or stake-holder is liable to pay the sum of \$62,358 to MIMB, although it has already paid this sum to Bahagia, albeit in breach of trust.

Counsel for MAS also argues that, although the total amount payable under purchase orders AB8 to AB11 is \$64,542.30, the plaintiff only claims for \$64,542 in the Statement of Claim. There being a difference of 30¢, he contends that the assignment is not absolute. It is true to constitute an enforceable assignment in equity, the assignment must be absolute and not partial. But, by paragraphs 1 and 2 of Statement of Agreed Facts, it is not in dispute that Bahagia had agreed to assign and transfer absolutely to MIMB the whole of the moneys payable to it from MAS under the contract. Since both parties have agreed that the assignment is absolute, it is not open for defendant now to say otherwise. In any event, what has become due and payable under the contract is the sum of \$62,358 and on the principle of *de minimis non curat lex*, this court should ignore the 30¢ difference.

Although not covered by the agreed issues, counsel for MAS also contends that the failure to join Bahagia as a party in these proceedings is fatal to its claim. The purpose of such joinder, according to Mr. Chin, is for accounts to be taken. In my view, where the assignment is absolute, then the assignee can sue in its own name, without joining the Assignor. (See *Snell's Principle of Equity*, 27th Edition, page 78). On the facts of the present case, Bahagia/Assignor has no more interest in the debt, and since Bahagia, which apparently is now defunct, can only be joined as a defendant and not as third party, I see no purpose for such joinder by plaintiff. But, it is of course open to defendant to join the Assignor as a defendant, as was done in *Sanders & Co. v. Peek*.⁽⁷⁾ But the Assignor cannot be compelled to come as a plaintiff. I am of the view that in the circumstances of the present case, the failure of Assignee to join the Assignor as a party is not fatal to plaintiff's claim.

On balance of probabilities on the evidence, I find it is the clear intention of Bahagia that MIMB should get the benefit of MAS contract. The defendant has not adduced any evidence to challenge such intention which is supported by PW1's testimony and corroborated by documentary exhibits. In the event, I give judgment for the plaintiff in the sum of \$62,358 and interest thereon at 6% per annum till date of payment, and costs.

Claim allowed.

Solicitors: Shook Lin & Bok; Allen & Gledhill.

QBE INSURANCE LIMITED v. DR. K. THURAISSINGAM

[A.C.J. (Wong Kim Fatt J.C.) January 20, 1982]

[Seremban — Civil Appeal No. 13 of 1981]

Insurance — Judgment against insured by 3rd party — Claim by third party direct against insurers — Whether insurers liable for property damage — Compulsory insurance — Road Traffic Ordinance, 1958, ss. 75(1)(b) & 80(1).

In this appeal, the third party brought an action direct against the insurers to recover a judgment sum for property damage caused by the insured of the insurers in a road accident under section 80(1) of the Road Traffic Ordinance, 1958. The learned trial Magistrate held that there was contractual liability on the part of the insurers and found for the third party. The insurers appealed.

Held, allowing the appeal: (1) as the judgment obtained by the third party was in respect of property damage only, and not death or bodily injury within the scope of compulsory insurance, he had no statutory right of action against the insurers under sections 80(1) and 75(1)(b) of the Ordinance; (2) the learned Magistrate erred in law in holding there was contractual liability on the part of the insurers.

D Cases referred to:-

- (1) *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908] 1 K.B. 1006, 1014.
- (2) *New Zealand Insurance Co. Ltd. v. Sinnadurai* [1969] 1 M.L.J. 183.

CIVIL APPEAL.

S. Radhakrishnan for appellants.

Rajan Rajasooria for respondent.

Cur. Adv. Vult.

Wong Kim Fatt J.C.: In this appeal the appellants, QBE Insurance Limited ("the insurers"), were at all material times the insurers of one Cheok Beng Seng ("the insured"), the defendant in Port Dickson Magistrate's Court Civil Action No. 55 of 1978 (formerly Port Dickson Sessions Court Civil Action No. 24 of 1977) in respect of a motor vehicle No. NH 4122, which, while being driven by the insured at 2½ mile-stone along Port Dickson-Seremban Road in the direction of Port Dickson, knocked into the rear part of motor car No. BK 9062 driven by the respondent, one Dr. K. Thuraissingam ("the third party") on or about February 23, 1977. The third party as plaintiff in the said Civil Action No. 55 of 1978 obtained on May 22, 1979 judgment by default against the insured in the sum of some \$6,300 for property damage with interest and costs (hereinafter referred to as "the judgment sum"). It is not in dispute that the third party had abandoned, not surprisingly, his claim for his superficial bodily injury in the form of a tender and swollen left knee for which he was asked to take his own treatment. Upon the insurers refusing to pay the judgment sum, the third party brought against them the above Civil Action No. 87 of 1979, which is the subject-matter of this appeal, relying in effect on the policy of insurance issued by the insurers and on sections 75(3) and 80(1) of the Road Traffic Ordinance, 1958 ("the Ordinance"). The insurers contended that they were not liable to pay the judgment sum. In the result, the learned Magistrate held that there was contractual liability on the part of the insurers and gave judgment on March 25, 1981, in favour of the third party, and hence this appeal by the insurers.